NO. 88-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EDWARD W. MURRAY, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

v.

JOSEPH M. GIARRATANO, et. al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

MARY SUE TERRY
Attorney General of Virginia
H. LANE KNEEDLER
Chief Deputy Attorney General
STEPHEN D. ROSENTHAL
Deputy Attorney General
* ROBERT Q. HARRIS
Assistant Attorney General
FRANCIS S. FERGUSON
Assistant Attorney General

Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-4624

* Counsel of Record

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This case involves a single question of law: does the Constitution require states to provide personal lawyers to represent inmates who desire to challenge death sentences in state post-conviction proceedings?

All death row inmates in Virginia have been represented by counsel in their state habeas corpus proceedings, whether by volunteer or court-appointed attorneys. Not one of the seven inmates executed in Virginia since this Court's decision in *Furman v. Georgia* was without counsel for a state post-conviction proceeding. All death row inmates have counsel now.

As the plaintiffs acknowledge (Respondents' Brief at 45), Virginia does not oppose inmates having attorneys in state habeas corpus actions. (J.A. 272). The Attorney General's Office joins in motions for stays of execution to permit the attor ieys to prepare and amend petitions and will join in motions for appointment of counsel filed by unrepresented inmates. (J.A. 271-72, 273, 278).

However, the inmates' preference for representation by particular counsel in such proceedings and the State's willingness to make representation by counsel available does not confer a right to counsel or define the state's constitutional obligation. Requiring appointment of counsel prior to the filing of a post-conviction action is unnecessary and unwise both because the totality of the procedures presently afforded those accused and convicted of capital offenses meets the requirements of fundamental fair-

ness and because intolerable consequences will follow the declaration of such a right. The prisoners offer nothing to support a constitutional basis for the obligation they intend to impose on Virginia, and suggest no means to limit such a broad right.

I. THE RIGHT OF MEANINGFUL ACCESS TO THE COURTS DOES NOT INCLUDE A RIGHT TO STATE-SUPPLIED PERSONAL LAWYERS.

In *Bounds v. Smith*, this Court held that states must provide prisoners with a source of legal information to assure a "reasonably adequate opportunity to present claimed violations of fundamental constitutional rights." 430 U.S. 817, 825 (1977). This obligation is met by providing law libraries *or* the assistance of "persons trained in the law." *Id.* at 828.

Bounds encourages flexibility in a state's response to its obligation of providing access to the courts. 430 U.S. at 830-32. Virginia has chosen to make legal assistance and information available to inmates through *both* methods approved by this Court in *Bounds*. Virginia provides adequate law libraries *and* makes attorneys available to provide legal assistance. Virginia thus already exceeds the requirements of the right of access identified in *Bounds*. The courts below ignored the clear meaning of *Bounds v. Smith* and instead transformed the limited right articulated in that case into a right to personal legal counsel.

Other federal courts have consistently refused to find a right to counsel in the right of access. *See Mann v. Smith*, 796 F.2d 79, 84 (5th Cir. 1986) ("*Bounds* cannot have meant to require legal assistance equivalent to the provision of a lawyer."); *Carter v. Fair*, 786 F.2d 433, 435 (1st Cir. 1986) ("Prison facilities are not required to provide comprehensive legal representation for inmates."); *Hooks v. Wainwright*, 775 F.2d 1433, 1436 (11th Cir. 1985) ("It presses credulity to contend that the Supreme Court intended there would be a constitutional right to legal counsel if it were found that some prisoners were illiterate and that nonlawyer prisoners could not use the libraries as well as lawyers."); *Corgain v. Miller*, 708 F.2d 1241, 1250 (7th Cir. 1983) ("Actual attorney-client representation is not necessary to remedy the library deficiencies.").

The plaintiffs refer to several court-ordered programs of assistance from paralegals or other "persons trained in the law" to supplement particular identified inadequacies in a state's law library plan. (Respondents' Brief at 27-28, nn. 6 & 7). The difference between legal assistance, as described in *Bounds*, 430 U.S. at 830-32, and representation by personal

counsel was ignored below, even though it is dispositive of this case. *No* court before now has ever applied *Bounds* to find a right to personal counsel.

II. A CONSTITUTIONAL RIGHT TO POST-CONVICTION COUNSEL IS AN UNWARRANTED INTRUSION INTO STATE PROCEEDINGS.

The creation of a federal constitutional right to counsel for state post-conviction proceedings eliminates the longstanding flexibility allowed states in the conduct of their post-conviction proceedings. The courts below embrace the position in this case that the Constitution dictates the precise form in which states must provide legal assistance to inmates in proceedings which are wholly the product of state law. This Court, however, explicitly rejected that premise in *Pennsylvania v. Finley*:

> On the contrary, in this area states have substantial discretion to develop and implement programs to aid prisoners seeking to secure post-conviction review.

107 S.Ct. 1990, 1995 (1987).

This flexibility is reflected in the varying methods of providing counsel for inmates in state post-conviction proceedings. Several states have chosen to provide for representation of inmates in post-conviction proceedings. *See, e.g.*, Fla. Stat. Ann. §§ 27.7001 et seq. (West 1988); Md. Ann. Code Art. 27 § 645A. Others have determined that counsel should be available after a petition is filed or if a hearing is required. *See* Ariz. Rule of Crim. Proc. 32.5(b); Mo. Rules of Criminal Procedure 24.035(e) and 29.15(e); N.C. Gen. Stat. § 7A-451(a)(2). Other states have chosen, as has Virginia, to permit discretionary appointment of counsel in post-conviction proceedings. *See* Nev. Rev. Stat. 34.750. The plaintiffs' evidence at trial indicated that two-thirds of the states with capital punishment statutes do not automatically provide for counsel to represent prisoners in their post-conviction efforts. (J.A. 72-73).

The plaintiffs urge this Court to substitute a rigid right to "the continuous services of an attorney to investigate, research and present claimed violations of fundamental rights." 668 F.Supp. at 514 (Pet. App. A-28), for the flexible approaches previously chosen by the states. Such a right will almost certainly bring with it never-ending collateral litigation.

A *state*-granted right to counsel for a state post-conviction proceeding, as in *Finley*, presents no *federal* issue concerning the adequacy of

that attorney's performance. The state courts remain free to determine how that right is satisfied. *Finley*, 107 S.Ct. at 1995. A *constitutional* right to counsel, however, implies a corresponding right to challenge the effectiveness of counsel and attack the validity of the proceedings involved.

Shortly after the district court's decision in this case, a Virginia death row inmate filed a last-minute petition challenging the effectiveness of his court-appointed habeas counsel. A panel of the Fourth Circuit applied this Court's decision in *Pennsylvania v. Finley* and rejected the claim. *Whitley v. Muncy*, 823 F.2d 55 (4th Cir. 1987). In the present case, however, the Fourth Circuit *en banc* majority held that *Finley* does not preclude recognition of a constitutional right to counsel in state habeas corpus proceedings involving a death sentence. Thus, the validity of state capital habeas corpus proceedings will again be subjected to challenge on wholly collateral matters as unsuccessful inmates assert their dissatisfaction with previous habeas counsel as a basis to avoid or overturn the results of prior collateral attacks. The decisions below present the very real prospect of institutionalizing infinite collateral litigation.

III. A DEATH SENTENCE DOES NOT WARRANT A NEW CONSTITUTIONAL RIGHT TO COUNSEL FOR STATE HABEAS CORPUS PROCEEDINGS.

The seriousness of the death sentence requires that the decision to impose that penalty be made with scrupulous fairness following a process that narrowly focuses the charging, trial and sentencing decisions to provide assurance that the punishment is appropriately determined. (Brief for Petitioners at 18-20). Once the sentence is imposed and upheld pursuant to this most careful process, it is entitled to the same presumption of legality and finality recognized for all criminal convictions.

The Constitution does not confer a special right to counsel for this class of inmates solely because they seek to challenge death sentences. It is the fundamentally distinct nature of post-conviction review that is incompatible with the requirement of a right to counsel. *Finley*, 107 S.Ct. at 1994. The plaintiffs ignore the basic purpose of habeas corpus proceedings, and disregard the rulings of this Court concerning the singular importance of the criminal adjudication process itself, *see Wainwright v. Sykes*, 433 U.S. 72, 90 (1977), and the essential interest in the finality of criminal judgments. *See Engle v. Isaac*, 456 U.S. 107, 127 (1982).

The trial and appellate protections afforded the defendant in every

capital case in Virginia, all further secured by a right to effective assistance of counsel during these stages of the proceedings, provide full assurance that the result is the product of the fairest system of adjudication that can be conceived. Once direct proceedings are concluded, however, nothing in the Constitution requires that Virginia, or any other state, provide a right to counsel for collateral attacks on a death sentence.

IV. VIRGINIA INMATES ARE PROVIDED MEANINGFUL ACCESS TO THE COURTS.

Given the absence of a constitutional basis, the decisions below cannot be justified by the district court's "findings of fact." The district court's interpretation of Virginia law, and its definition of the right of access to the courts, are not findings of fact. These are manifestly matters of law.

The district court erred at step one. By measuring the means of obtaining legal information and assistance against the benefits of a personal lawyer, the court below made conclusions as to the adequacy of Virginia's assistance under an incorrect legal standard. Even while accepting the district court's "findings", the Fourth Circuit majority treated this issue as a matter of law independent of any facts:

> Because of the peculiar nature of the death penalty, we find it difficult to envision any situation in which appointed counsel would not be required in state post-conviction proceedings when a prisoner under a sentence of death could not afford an attorney.

847 F.2d at 1122 n.8. (Pet. App. A-7-8). As a matter of law, however, the courts below misinterpreted the state's constitutional obligation to provide meaningful access to the courts.

The legal resources currently available to inmates in Virginia assure that all inmates have a reasonable opportunity to fairly present their claims in state and federal courts. No findings of fact of the district court in this case suggests that the Virginia system is inadequate under the long-settled interpretation of the right of access to the courts. As the district court acknowledged, Virginia's choice of methods for meeting its access obligation has been upheld consistently by that court and the Fourth Circuit. 668 F. Supp. at 514. (Pet. App. A-27).

An inmate may, under existing Virginia law, ask a state court to appoint counsel to represent him in a state habeas corpus action. The record establishes that Virginia courts have exercised that authority to appoint counsel whenever asked by an unrepresented death row inmate.

(J.A. 325, 328, 353). If an inmate needs assistance in making such a request, the institutional attorney may assist him. (J.A. 222, Tr. 335). The Virginia Attorney General's Office will join in such motions made by unrepresented death row inmates. (J.A. 272-73, 278).

An inmate may prepare a habeas corpus petition himself, or with the assistance of the institutional attorneys. The law libraries and the institutional attorneys are available for inmates who want legal information and assistance to prepare such petitions. (J.A. 302-305, 331-35, 340, 344-45). The institutional attorneys have prepared habeas corpus petitions for inmates who have requested such assistance. (J.A. 218-20, 234-35). No death row inmate has ever asked an institutional attorney to prepare a habeas corpus petition. (J.A. 224, 230).

Inmates are not limited only to those claims filed in the initial pleadings presented to the state habeas corpus court. Whether the inmate proceeds *pro se* or with counsel, amendments to habeas corpus petitions are liberally granted, in Virginia as in the federal courts. Rule 1:8, *Rules of the Virginia Supreme Court*. The institutional attorneys are available to help with amendments and responses to pleadings submitted on behalf of the Commonwealth. (J.A. 220). The state courts routinely allow amendments. (J.A. 105).

When a hearing is held on a petition for a writ of habeas corpus, counsel is appointed by the state court. This has long been the rule in Virginia for all habeas corpus actions. *Darnell v. Peyton*, 208 Va. 675, 160 S.E.2d 749 (1968). Appointed counsel is also available for an appeal of the habeas corpus action. *Cooper v. Haas*, 210 Va. 279, 170 S.E.2d 5 (1969).

Legal information and assistance is not limited to the inmates' state court efforts, but is available for federal court actions as well. In federal court, inmates challenging a death sentence will also be entitled to seek the appointment of counsel under the recently enacted Anti-Drug Abuse Bill of 1988. Public L. No. 100-690, 102 Stat. 4181 (1988).

The variety of sources of legal information and assistance made available to Virginia's death row inmates assures that they will continue to have the opportunity to identify, develop, and present their claims to the appropriate courts, and have a fair adjudication of their claims. There is no evidence that Virginia's chosen method of providing access has ever failed.

V. THE ALTERNATE GROUNDS OFFERED BY THE PLAINTIFFS CANNOT SUPPORT THE DECISIONS BELOW.

Recognizing the lack of merit in their theory of access to the courts, the plaintiffs have resurrected the alternate bases for a right to post-conviction counsel originally advanced in the district court. They now ask this Court to affirm the judgments below under the Eighth Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Sixth Amendment, and the Suspension Clause of Article I. These constitutional theories were not addressed in any fashion by the courts below. Plaintiffs' arguments evade the issue that this Court granted certiorari to review.

These theories are properly rejected for a common reason: lack of merit. The Eighth Amendment concerns identified by this Court have led to heightened procedural requirements for capital trials and sentencing proceedings. *See Zant v. Stephens*, 462 U.S. 862, 876-77 (1983). The plaintiffs do not dispute that Virginia law meets or exceeds all the requirements of the Constitution for the imposition of a death sentence. (See Brief for Petitioners, at 12-13). This Court has specifically rejected the argument that a due process or equal protection right to counsel exists for state post-conviction proceedings. *Pennsylvania v. Finley*, 107 S.Ct. at 1993-94. The Sixth Amendment right to counsel, by its own terms, applies only in criminal prosecutions. The suspension clause of Article I, although clearly not implicated here, restricts actions of the federal government, not the states. *See Gasquat v. LaPeyre*, 242 U.S. 367, 369 (1917). States have no constitutional obligation to provide post-conviction relief. *Finley*, 107 S.Ct. at 1995.

CONCLUSION

The Constitution does not require states to provide personal attorneys to represent inmates seeking to challenge death sentences in state post-conviction actions. Accordingly, the decision below requiring Virginia to do so should be reversed.

Respectfully submitted,

MARY SUE TERRY
Attorney General of Virginia

H. LANE KNEEDLER
Chief Deputy Attorney General

STEPHEN D. ROSENTHAL
Deputy Attorney General

* ROBERT Q. HARRIS
Assistant Attorney General

FRANCIS S. FERGUSON
Assistant Attorney General

Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219

* Counsel of Record

February 1989